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No. 01-1155

IN THE

Supreme Court of the United States

MAINE YANKEE ATOMIC POWER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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PARTIES TO THE PROCEEDING BELOW

The only parties to this case are Maine Yankee Atomic Power Company and the United States of America. However, similar cases were decided by the court of appeals on the same day involving as plaintiffs Omaha Public Power District, Commonwealth Edison Co. and Sacramento Municipal Utility District. Those parties have all filed petitions for certiorari (Nos. 01-1398, 01-1411 and 01-1020, respectively).

RULE 29.6 STATEMENT

The parent companies and publicly-held corporations that own 10% or more of the stock of Maine Yankee Atomic Power Company are:

a. Three wholly-owned subsidiaries of Northeast Utilities are stockholders of Maine Yankee, with the following ownership percentages: The Connecticut Light & Power Company—12%; Public Service of New Hampshire—5%; and Western Massachusetts Electric Company—3%.

b. National Grid Group PLC (Holding company for New England Power Co., which owns 24% of Maine Yankee stock).

c. Energy East Corporation (Holding company for Central Maine Power Co., which owns 38% of Maine Yankee's stock).

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REPLY BRIEF FOR PETITIONER

Strikingly, the government's opposition brief does not discuss or even *mention* the most important feature of this case, namely the government's commercial self-interest in imposing the retroactive monetary assessment contained in the Energy Policy Act ("EPACT"). That commercial interest motivated the government to shift enrichment plant cleanup costs away from itself, contrary to the explicit cost allocation previously set forth in the parties' fixed-price contracts. And the government's commercial self-interest also motivated it to shift the plant cleanup costs away from future enrichment plant customers, in order to maximize future sales of enriched uranium and thus the privatization value of the government's enrichment business.

Because the government's opposition brief completely ignores the government's underlying commercial interest in enacting the retroactive EPACT assessment, the arguments the government does make in opposition to certiorari are essentially beside the point. Indeed, the government's failure to come to grips with the fundamentally commercial setting in which the retroactive EPACT assessment was enacted demonstrates—rather starkly Maine Yankee submits—that the government has no real answer to Maine Yankee's showing (accepted by the concurrence below and the *en banc* dissent) that the Federal Circuit majority wrongly analyzed this case as one where the government was merely regulating financial affairs among private parties. Absent review by this Court, the faulty analytic framework adopted by the Federal Circuit will govern all future cases involving the legislative infringement of federal contract rights as well as wholly new retroactive taxes and other monetary exactions.

1. As Maine Yankee's petition demonstrates, its historical fixed-price contracts with the government are at the heart of

this case.[1] Remarkably, and importantly, in discussing the contract-based claims rejected by the Federal Circuit, the government's opposition brief does not even attempt to defend the fundamental rule of law applied by the court below. The government does not claim that a statute like the EPACT assessment which falls predominantly (at least 85%) on the government's contracting partners *should* properly be considered a "public and general" law that—under the "sovereign acts" doctrine—exonerates the government from contract liability. The government's silence should be taken for what it is—an implicit acknowledgment that the rule of law applied by the court below is completely indefensible. It bears emphasis, in that regard, that the statutory EPACT assessment is directed at *every* "SWU" that utilities previously purchased under *every* direct purchase contract with the government. The assessment thus targets and hits *all* of the government's direct contracting partners. The Federal Circuit's conclusion that the statute was nevertheless a "general" one rested on the court's understanding that the assessment, while hitting *every* direct contract purchaser, also hit some small number of additional, indirect contract purchasers. *See* Pet. at 13-16 (noting comparable "direct hit-plus" facts in *Winstar*, *Perry* and *Lynch*); *see also* Pet. at 5-6 n.5 (suggesting all indirect SWU purchasers also had direct contracts with the government).

Rather than defending the Federal Circuit's extraordinary holding, the government urges the Court to avoid reviewing the important contract-based question presented in this case for a variety of other reasons. The government first points out that the Court denied review of the same contract-based claims in *Yankee Atomic*, and "there is no basis in this case

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[1] The *amicus* briefs supporting certiorari filed by the U.S. Chamber of Commerce and by the Federal Circuit Bar Association likewise recognize the primacy of the contract question presented in this case and the other similar cases pending on certiorari.

for a different result." Op. at 11. But this Court often declines review of cases presenting "certworthy" issues to allow for further percolation in the lower courts. Here, developments over the five years since the Federal Circuit's *Yankee Atomic* decision make review of the contract question presented both appropriate and necessary.

The split-panel decision in *Yankee Atomic* was rendered shortly after *Winstar*, and was the Federal Circuit's first explication of this Court's plurality decision in that case. Since then, the *Yankee Atomic* panel majority opinion has frequently been invoked by the Court of Federal Claims and by other courts of appeals, *see, e.g., Grass Valley Terrace v. United States*, 51 Fed. Cl. 436, 440-41 (2002); *Tamarind Resort Assoc. v. Virgin Islands*, 138 F.3d 107, 112 (3d Cir. 1998), and the *Yankee Atomic* panel opinion has now been adopted and applied by a split majority of the *en banc* Federal Circuit. That nationwide court's extreme application of *Winstar* is therefore now ripe for review and will never be more ripe. Moreover, in opposing certiorari in *Yankee Atomic* the government argued that no due process issue had been litigated below in that case, *see* Pet. at 26, and certainly the Federal Circuit's decision in *Yankee Atomic* did not address any constitutional issues arising from the extreme retroactivity of the EPACT assessment. Now that the Federal Circuit has squarely addressed the constitutional issues as well as the contract issues involved here, this Court is also in a position to consider the issues together if it elects to do so—or, if not, at least to review the contract issues with a clear understanding of the Federal Circuit's view of the constitutional issues.

The government also is wrong in contending that this case is an inappropriate vehicle for the Court's clarification of *Winstar's* reach because the case technically involves no government breach of a contract term. Op. at 11. The government's claim that this case involves no actual breach,

even if true, is irrelevant. The *Yankee Atomic* panel took that view, noting, however, that "[t]his distinction [whether or not there is a technical breach] does not affect our decision . . . . Regardless of whether the situation is characterized as a breach of contract, an unlawful taking or an unlawful exaction, the arguments stem from Yankee Atomic's prior contracts with the government." 112 F.3d at 1573 n.2. The *Yankee Atomic* panel then proceeded not only to adjudicate the utility's contract-based claims, but also to extensively analyze both the plurality and concurring opinions in *Winstar* and then to articulate and apply its own understanding of the contract-law doctrines of "sovereign acts" and "unmistakability." *Id.* at 1574-80.

In any event, the government's attempt through the retroactive EPACT assessment to shift its costs onto Maine Yankee, in spite of Maine Yankee's prior full payment, *can* properly be viewed as a breach—or abrogation—of the contractual fixed-price terms. *See United States v. Spearin*, 248 U.S. 132, 136 (1918) ("Where one [by contract] agrees to do, for a fixed sum, a thing possible to be performed, he will not . . . become entitled to additional compensation, because unforeseen difficulties are encountered."). It seems clear that the government would have had no lawful basis for simply insisting that purchasers of enriched uranium pay more than the contractually-specified prices to defray the government's additional costs. It is only the power of the government to act unilaterally by legislation that puts its contracting partners in the position of being compelled to pay again. If the government had instituted a tax enforcement action, and Maine Yankee had defended by asserting prior payment under its fixed-price contracts, the government could not plausibly deny that the case involved contract-based claims. That this action was instituted by Maine Yankee, rather than

the government, cannot prevent the very same contract-based rights from being asserted—and recognized—here.[2]

Finally, the government's claim that the Federal Circuit "correct[ly]" applied the sovereign acts and unmistakability doctrines, Op. 12, is wholly conclusory and fails to confront the serious and troubling issues raised in Maine Yankee's petition (and by *amici* supporting certiorari, *see* note 1). In essence, the government's brief simply parrots the rationale for rejecting the utilities' contract-based claims that was articulated in *Yankee Atomic* and adopted wholesale by the Federal Circuit *en banc* majority. *See* Op. at 11-13.[3] Thus, as noted above, the government all but acknowledges that *Yankee Atomic* is problematic—by failing to defend (or even mention) the rule of law applied there (and here), which sanctions targeted legislation that falls squarely on the government's contracting partners and revises retroactively the financial terms of the government's own contracts. The government's opposition brief simply does *not* demonstrate the correctness of that rule of law. Ultimately, this profound government silence underscores both the need for further review and the opportunity this case presents to clarify and reconfirm the principles set forth in *Winstar*.

2. The government's arguments against further review of the taking and due process questions presented here are equally without merit.

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[2] The cases cited by the government, Op. at 11, are simply irrelevant. *See John J. Kirlin, Inc. v. United States*, 827 F.2d 1538 (Fed. Cir. 1987) (applying contract clause requiring action prior to contract completion); *Mulholland v. United States*, 361 F.2d 237 (Ct. Cl. 1966) (involving statute of limitations accrual date).

[3] The one new point the government makes, that *Winstar* was different because it involved "guarantee clauses in contracts," Op. at 13, is flatly wrong. *Winstar* upheld contract claims in the face of subsequent legislation as a matter of law, not because of any special contractual guarantee clause. *See Winstar*, 518 U.S. 839.

a. The government contends that Maine Yankee's challenge to the retroactive EPACT assessment as a violation of the Takings Clause must fail for two reasons: first, the payment of money can never be a taking, Op. at 13-16; and second, the assessment survives scrutiny under the familiar three-part takings analysis (which focuses on economic impact, interference with expectations and the nature of the offending governmental action), *id.* at 16-19. The Federal Circuit never undertook the three-part analysis, however; it denied Maine Yankee's taking claim at the threshold because it involved payment of money, rejecting the utilities' position that a statutory exaction paid directly to the government can be a taking. App. at 57a-60a.

The government argues against review of the Federal Circuit's holding by purporting to count votes in *Eastern Enterprises*, *see* Op. at 13-14. That case, however, involved no majority opinion or even majority rationale in favor of the result. Moreover, as the government acknowledges in a footnote, Op. at 14 n.5, Justice Breyer's opinion for four Justices in *Eastern Enterprises* expressed no clear view on whether a direct governmental exaction could be a taking.[4] More fundamentally, *Eastern Enterprises*, unlike this case, did not involve a statutory obligation to pay money directly to the government. In contrast to *Eastern Enterprises*, therefore, this case squarely presents the question posed by Maine Yankee and decided in the negative by the Federal Circuit—can a statutory obligation to pay money to the government, such as a tax, ever be a taking?[5]

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[4] The concern expressed by Justice Breyer, and by the government, *see* Op. at 14 n.5—that finding a taking here could expose all taxes to takings claims—is easily answered by the limiting facts of this case and by Congress' ability and general practice to impose new taxes only *prospectively*. *See* Pet. at 22 n.14.

[5] Indeed, the answer to the question here would seem to be presaged by *Webb's*, where this Court found a State-imposed fee to be a taking. The

b. The government addresses Maine Yankee's claim that the EPACT assessment constitutes an unconstitutional "wholly new tax" in a footnote in the due process section of its opposition brief. Although it is true that this Court has historically viewed retroactive tax cases as presenting due process issues, the plurality opinion for four Justices in *Eastern Enterprises* rejected the imposition of retroactive liability under the Takings Clause. For that reason, and in view of the taking-of-money question presented in this case by EPACT's direct statutory exaction, the wholly new EPACT "tax" also should be viewed as a taking. Indeed, the *Yankee Atomic* dissent (now adopted by the Federal Circuit *en banc* dissenters) found that the EPACT assessment was an unlawful exaction that worked a taking. *See* 112 F.3d at 1584-85; *see also Eastport S.S. Corp. v. United States,* 372 F.2d 1002, 1009 (Ct. Cl. 1967) (Court of Federal Claims jurisdiction under the Tucker Act, 28 U.S.C. § 1491, extends to claims for recovery of unlawful monetary exactions).

Regardless of the constitutional clause involved (and Maine Yankee submits that both the Takings and Due Process Clauses are involved), the government's primary argument against review of the wholly new tax issue is that this Court's precedents invalidating retroactive new taxes involved taxes that raised "*general* revenues," whereas EPACT "involves an assessment for a dedicated purpose." Op. at 20 n.9. If anything, however, a "dedicated purpose" tax—especially one so clearly targeted at the government's prior contracting partners—is even more repugnant than a "general purpose"

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government's attempt to distinguish *Webb's* as involving interest earned on a specific fund, and ultimately the fund itself, Op. at 15-16, distorts the facts of that case. *See* 449 U.S. at 162-63 (describing the fee involved as an "exaction" and a "forced contribution to general government revenues.").

tax. The government neither cites any authority nor offers any argument to the contrary.[6]

c. The government's analysis of the due process question also ignores the central relevance of the government's commercial self-interest. Op. at 19-27. The government thus again makes the same analytic mistake that the Federal Circuit made, and therefore fails to address the fundamental due process question this case presents—whether the government's commercial self-interest in making the EPACT assessment retroactive *matters* under the Due Process Clause. That question has particular importance given the government's startling suggestion, Op. at 20, that the Federal Circuit's decisions below are unobjectionable because "retroactive economic legislation enjoys a presumption of validity."

Notably, the *sole* reason the government made the EPACT assessment retroactive was to avoid imposing a de facto price increase on future enrichment plant customers, thus assuring greater future enrichment sales—and ultimately greater proceeds to the U.S. Treasury from the sale of the U.S. Enrichment Corporation's common stock. If the purpose was truly to tax "all" utilities that "benefitted" from the plants, as the government now says, Op. at 21, 26, the monetary assessment would have to be imposed on future, post-EPACT customers as well. Even if the government's other due process arguments about the parties' expectations, the period of retroactivity and the reasonableness of the cost-sharing were to be accepted (and they should not be accepted, *see* Pet. at 22-26) the government cites no precedent, and Maine Yankee is aware of none, indicating that the imposition of monetary liability in a wholly retroactive manner can be

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[6] The government's suggestion, Op. at 20 n. 9, that this Court's decisions invalidating wholly new retroactive taxes have been discredited *as applied to such taxes*, is belied by the very case the government cites in support of that proposition, *United States v. Carlton*, 512 U.S. 26, 34 (1994). *See* Pet. at 18.

justified *solely* by a desire to advance the government's commercial self-interest. Indeed, the government does not even offer that justification for EPACT's retroactive reach.

Finally, the government attempts to cast EPACT as a reasonable allocation of costs among equally worthy contributors, and argues the matter is thus one for Congress rather than the courts. In particular, the government points out that EPACT imposes on it a significant share of the cleanup liability, and suggests that this somehow blunts the force of Maine Yankee's arguments. Op. at 26. But this argument is a *non-sequitur*: an improper shifting of costs, and more generally an improper imposition of new retroactive liability, cannot be justified by saying that the challenged law might have shifted more costs or imposed greater retroactive liability. Thus, the validity of the retroactive EPACT assessment, as against the government's prior fixed-price contracts and the Fifth Amendment's guarantees, is a matter that this Court can and should determine.[7]

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Further review is warranted of the important questions presented in all of these EPACT special assessment cases. To the extent the Court grants plenary review in one or more of the pending cases other than this case,[8] Maine Yankee respectfully requests that the Court hold its petition pending

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[7] The government's position is not helped by its incorrect claim that EPACT confers a "right" of pass-through to utility customers. *E.g.*, Op. at 22. In fact, the provision in question merely *allows* pass-through, subject to market forces, comparable to the provision dismissed as irrelevant in *Eastern Enterprises*. *See* 524 U.S. at 531 (provision "preserves Eastern's right to pursue indemnification, . . . it does not confer any right of reimbursement").

[8] *Sacramento Mun. Util. Dist. v. United States*, No. 01-1020; *Commonwealth Edison Co. v. United States*, No. 01-1411; and *Omaha Pub. Power Dist. v. United States*, No. 01-1398.

disposition of the other case(s). However, Maine Yankee also respectfully submits that this case provides a particularly good vehicle for the Court to consider the issues presented.

First, Maine Yankee stopped purchasing the government's enriched uranium a number of years prior to the enactment of EPACT, and thus its case cleanly presents the contract and constitutional questions arising from EPACT's impact on previously-concluded transactions. In addition, Maine Yankee, unlike the petitioners in the three other related cases, did not enter into a "Supplemental Agreement of Settlement" with the government. *See, e.g.*, OPPD Pet. at 4; SMUD Pet. at 5. Those agreements potentially implicate the question whether a second government promise is required for its contract commitments to survive subsequent legislation.

Most federal procurement and other contracts do not contain such a second promise, and courts have generally rejected the "two-promise" theory. *See, e.g., Winstar*, 518 U.S. at 922 (Scalia, J., concurring in the judgment) (although "one who deals with the government may need to 'turn square corners,' . . . he need not turn them twice.") (citations omitted); *see also supra* note 3. Nonetheless, *Yankee Atomic* (and thus the decisions below) can be read to require such a second promise against future conflicting legislation. *See* 112 F.3d at 1579-80; OPPD Pet. at 16-17; *see also* Op. at 17.

Given these circumstances, if the Court decides to grant plenary review in any of these cases, it should include this case, where Maine Yankee's solitary fixed-price contracts present the issues unencumbered by the "second promise" aspect of the other cases.

For the reasons set forth above and in Maine Yankee's petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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